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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER GUZMAN, Defendant and Appellant.	B207281 (Los Angeles County Super. Ct. No. NA075286)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gary J. Ferrari, Judge. Modified and, as modified, affirmed with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

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Alexander Guzman appeals from the judgment entered following his conviction by jury on count 4 - grand theft of personal property (Pen. Code, § 487, subd. (a)) and count 5 - second degree commercial burglary (Pen. Code, § 459). The court sentenced appellant to prison for two years. We modify the judgment and, as modified, affirm it with directions.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that in August 2007, Christopher Jackson was an area loss prevention manager at a Pep Boys store in Harbor City, and appellant was a delivery person for the store. According to Jackson, the store had suffered excessive losses. Jackson spoke with the store manager about the matter but was not satisfied with the manager's statements. As a result, on August 2, 3, and 6, 2007, Jackson conducted surveillance on the store.

On August 2, 2007, an unidentified male entered the store with a flat duffel bag. The store later closed about 7:00 or 8:00 p.m. Ninety minutes after the store closed, the male exited with the duffel bag and a Pep Boys bucket. The duffel bag appeared to be full, and the bucket contained items.

On August 3, 2007, the store closed at 8:00 p.m. At some point, appellant and an unidentified man arrived in a burgundy SUV which had no license plates. About 8:55 p.m., Jackson and his partner, John Casale, saw appellant walk to the store's front door, then walk to the side of the store. There was a service base at the side of the building and a door was still open. Appellant entered the store through its service department. Jackson also testified that the store had not closed properly, its service bay door was open, and appellant simply walked inside. At some point the other man entered the store. About 9:22 p.m., appellant and the man exited, and one was pushing a shopping cart full of merchandise. Jackson also testified that appellant and the man did not exit the store together. Appellant and the man unloaded the merchandise from the cart into a vehicle and left in it. The man with appellant was not identified as an employee. Jackson and

Casale did not approach appellant after he unloaded the items into the vehicle, because Jackson and Casale were conducting surveillance, they were unarmed, and they did not know who the man with appellant was.

On August 6, 2007, after the store was closed, someone opened the store's locked front door and permitted appellant to enter. Appellant later exited, pushing a cart full of store merchandise. Because of Jackson's vantage point and the amount of items in the cart, the only item Jackson could identify in the cart was a car battery. Appellant removed about 20 items from the store, and they were placed in a gold SUV. The battery was the only one of the 20 items which Jackson remembered. Jackson was unarmed during the August 6, 2007 surveillance.

Jackson testified that he reviewed the company's transaction records for the above dates and times and for the battery which Jackson had seen in the cart. He also reviewed employee purchase discount information. Jackson reviewed this information with appellant and they determined that no one had paid for the above merchandise which had left the store.

Casale, a divisional investigator for Pep Boys, was conducting surveillance with Jackson on August 3 and 6, 2007. Casale did not remember any particular item of merchandise that appellant took on August 6, 2007. One of the three Pep Boys employees whom Casale investigated concerning this matter was Juan Sanchez, a sales associate. Casale testified that Jackson interviewed Jovany Ortiz.

Jackson testified that he prepared a report which described vehicles which were being investigated. One was a black SUV associated with Ortiz. Ortiz was an assistant store manager and a suspect. Another vehicle was the gold SUV, which was associated with appellant. A total of three persons were arrested or prosecuted other than appellant, and the three persons were store employees.

On August 9, 2007, Mike Valle, another area loss prevention manager, conducted a taped interview of appellant. Appellant told Valle that appellant had been employed at the store about one year two months. Appellant said that about 30 times during his employment at the store, he had allowed, and/or brought, friends into the store for the

purpose of causing loss to the company. Appellant told Valle that appellant paid for a portion of the items taken but did not pay for most of them.

As to the items which appellant claimed he had paid for, he said he did not pay full value for them and he provided no proof of payment. Appellant said he understood he was causing a loss to the store when he did not pay full value for an item. Concerning the issue of appellant not paying full value for an item, appellant mentioned an Optima "high end" battery valued at about $179 and for which appellant said he had paid $100. The store did not sell that battery for $100.

Appellant indicated to Valle that when appellant brought his friends to the store and the store suffered a loss, appellant would receive a benefit. Appellant said he received benefits as a result of introducing his friends so that merchandise could be stolen from the store. The benefits included a dog, food, and various favors.

During the interview, Valle asked if appellant could remember all the items that he had taken, or had assisted in taking, from Pep Boys. Valle made a list of those items. Before making the list, Valle asked appellant to walk down each aisle of the store and see if he could remember any merchandise that appellant assisted in stealing, or that he stole himself. Based on that information and appellant's admissions to Valle, Valle made a list (People's exh. No. 1) of all such items. On August 9, 2007, appellant signed and dated the list, which was admitted into evidence. The list reflected items, the value of each, and the total value of the items. The value of each item was its average price, which was agreed upon by Valle and appellant. Valle testified the total value of all items stolen was $4,854.86.[1] In Valle's experience, a thief would not steal a "middle range" item.

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[1] In fact, the total value was $5,654.86, since the list reflected the following items, prices, and item totals: 10 stereos at $80 each, totaling $800; 10 starters at $70 each, totaling $700; 10 alternators at $80 each, totaling $800; 3 car batteries at $159 each, totaling $477; 5 amplifiers at $89 each, totaling $445; 6 subwoofers at $80 each, totaling $480; 1 air conditioning unit at $199; 3 DVD players at $89.99 each, totaling $269.97; 10 drill guns at $79 each, totaling $790; 3 tool sets at $50 each, totaling $150; 5 units of antifreeze at $7.99 each, totaling $39.95; 4 light bulbs at $29 each, totaling $116; 5 carpets at $19.99 each, totaling $99.95; 4 wiper blades at $8 each, totaling $32; 1 battery charger at $30; 1 water pump at $50; 50 quarts of oil at $3.50 each, totaling $175. In

According to Valle, thieves stole "higher dollar merchandise" as opposed to a generic or average brand. To be fair, Valle used a median value to determine the total loss.

Appellant told Valle that appellant did not personally receive any of the items listed in People's exhibit No. 1, and appellant admitted to taking only a battery and tool kit. Appellant said he had paid Ortiz for those two items, but did not pay the full retail value for them. Valle also testified appellant said he removed the Optima battery and tool set, paid money therefor but was not required to pay full retail value, and he caused a loss. Appellant paid $100 for the battery and $40 for the tool set. Valle determined the maximum value of an Optima battery. He testified the store sold Optima batteries "up to [$]199 at that time, $199." Appellant told Valle that the tool set contained 71 pieces. According to Valle, the lowest price for the tool set would have been about $80.

Appellant told Valle that Ortiz had been telling appellant to bring appellant's friends and acquaintances into the store so that appellant's friends and acquaintances could pay Ortiz cash and appellant would receive favors for taking merchandise out of the store after hours without paying for it. Appellant said Ortiz bought him lunch on at least one occasion in order to meet people so that merchandise could be taken from the stores after hours.[2]

Based on appellant's admissions to Valle, Valle concluded Ortiz was rewarding appellant for referring appellant's friends to Ortiz. Appellant told Valle that, after hours, appellant would bring people into the store, Ortiz would allow appellant to enter the store, and appellant would enter with persons who were not employed there. Appellant would later leave with unpaid merchandise, and, on several occasions, appellant left with

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particular, the entry concerning the three car batteries at $159 each appears to say: "Batteries: (3) Optima ($159 ea) (1) – for Alex =$477." Concerning this list and its reference to oil, Valle testified there were "about 50 quarts of oil -- fifty units, I'm sorry, of oil."

[2] Valle testified that before Valle came to the store on August 9, 2007, Jackson told Valle that appellant, Ortiz, and at least one or two other associates were involved in this matter.

the persons with whom he had arrived. Appellant said he did this about 30 times. Valle also testified that appellant said that, about 30 times, appellant participated in bringing people to the store, and appellant also said that, on 30 occasions, appellant personally brought people into the store to steal. Valle further testified that appellant said that, other than the battery and tool kits, Ortiz had given all of the items to other people. Appellant said Ortiz received money, but appellant denied that appellant received money. Appellant said Ortiz gave appellant, inter alia, a dog and lunch.

During the interview, appellant said he had assisted in loading trucks full of stolen merchandise. Pep Boys never gave appellant permission to take items after hours or to bring friends after hours to take items.

Los Angeles Police Officer Rosario Herrera testified as follows. Herrera also interviewed appellant, who said the following. Appellant had worked at the store for a year and a half. Appellant knew the manager would take things out of the store, so appellant advised the manager that appellant needed a battery and tool box. The manager sold a battery and tool box to appellant. Appellant brought friends to the location. One such friend was a person named Robert, whom appellant brought to buy items from the manager. As to the items which appellant stole or which he assisted in taking, appellant indicated he still possessed two such items, i.e., the battery and tool box.

Appellant also said that he knew items were being taken from the store, because he would hear a signal activate when he exited the store with items. When appellant explained to Herrera the conversation that appellant had with Ortiz, appellant used the term "hooked up." The term meant that appellant could obtain items from the store for free or at a reduced price. Appellant said he had become aware that people were taking items out of the store. Ortiz was allowing people to enter the store and take items, and Ortiz made it obvious.

Appellant explained in detail to Valle how appellant would enter the store and what would later occur. Appellant said he would come to the store after it was closed, Ortiz would open the door, and that was how appellant would retrieve the items.

2. *Defense Evidence.*

In defense, appellant denied he was present at the store on August 2, 3, or 6, 2007. Appellant also testified that he worked at the store for about a year and a half. In about July or August 2007, appellant became aware that thefts from the store were occurring. He learned that Ortiz was taking items from the store when appellant overheard the previous manager tell Ortiz to do the same thing that the previous manager had done. Appellant denied taking anything from the store in connection with the previous manager. Appellant denied helping the previous manager or Ortiz help a customer take something out of the store.

Appellant did not tell police that he brought people over 30 times to take things out of the store without paying for them. Appellant was trying to say that, over 30 times, he saw people come and take items. The 30 people were people Ortiz brought. Appellant was in the store on a few occasions when this happened. Appellant saw these people go to Ortiz and ask for property. None of the people asked appellant to give them items from the store. Appellant never intended to participate in the 30 people coming to the store and taking items, and appellant did not help them.

The battery and tool kit were the only items appellant took from the store, and he paid for those items. As to the battery, appellant had told Ortiz that appellant needed a battery, and appellant asked Ortiz for a discount. Ortiz said not to worry about it, and told appellant to come to the register and that Ortiz would take care of appellant. The store was open at the time, and appellant did not go to the back of the store and hide the transaction. He bought the battery and tool kit in October or November. Ortiz told appellant that appellant was not going to get a receipt. Appellant found it strange that he had not received a receipt for items he had purchased. Appellant did not report any theft problems to management because Ortiz had threatened to do something to appellant's family if appellant said anything. Appellant never intended to steal from the store. The worst thing he did involved the battery and tools, and he knew that that was wrong.

Appellant lied to Valle during the interview because appellant was afraid. Appellant was afraid because of Ortiz's threats. Appellant denied telling police that

appellant helped load stolen items into appellant's truck. People's exhibit No. 1 was a list of what, on 30 occasions, Ortiz and his friends took. Appellant did not participate in the taking of those items.

CONTENTIONS

Appellant claims (1) there was insufficient evidence to support his conviction and (2) Penal Code section 654 barred multiple punishment on counts 4 and 5.

DISCUSSION

1. *Sufficient Evidence Supported Appellant's Conviction for Grand Theft of Personal Property (Count 4).*

a. *Pertinent Facts.*

The information alleged as count 4 that "[o]n or between August 2, 2007 and August 6, 2007, . . . the crime of grand theft of personal property, in violation of Penal Code section 487(a), a Felony, was committed by [appellant], who did unlawfully take money and personal property of a value exceeding Four Hundred Dollars ($400), to wit store merchandise the property of Pep Boys." (Some capitalization omitted.) Counts 5 and 6 each alleged that appellant committed second degree commercial burglary. Count 5 alleged the offense occurred "[o]n or about August 6, 2007[.]" Count 6 alleged the offense occurred "[o]n or about August 3, 2007[.]"[3]

The jury convicted appellant on counts 4 and 5, but acquitted him on count 6. As to count 4 in particular, the jury found appellant guilty of "theft of personal property in

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[3] The court, using CALJIC No. 14.21, instructed the jury that $400 was the demarcation value between grand and petty theft, and, using CALJIC No. 14.26, instructed on how the jury was to determine property value. CALJIC No. 14.26, stated, "When the value of property alleged to have been taken by theft must be determined, the reasonable and fair market value at the time and in the locality of the theft shall be the test. Fair market value is the highest price, in cash, for which the property would have sold in the open market at that time and in that locality, (1) if the owner was desirous of selling, but under no urgent necessity to do so; (2) if the buyer was desirous of buying but under no urgent necessity to do so; (3) if the seller had a reasonable time within which to find a purchaser; and (4) if the buyer had knowledge of the character of the property and of the uses to which it might be put."

violation of Penal Code Section 487(a), a Felony, as charged in Count 4 of the Information." (Some capitalization omitted.) The jury also found that the theft was grand theft.

b. *Analysis.*

We reject appellant's claim that there was insufficient evidence that he committed grand theft of personal property. Penal Code section 487, subdivision (a), states, in relevant part: "Grand theft is theft committed in any of the following cases: [¶] (a) When the . . . personal property taken is of a value exceeding four hundred dollars ($400)[.]"

There is no dispute appellant committed theft by larceny of the merchandise contained in the carts on August 3 and 6, 2007. The issue is whether that merchandise was "of a value exceeding four hundred dollars[.]"

In *People v. Bailey* (1961) 55 Cal.2d 514, our Supreme Court stated, "Several recent cases involving theft by false pretenses have held that where as part of a single plan a defendant makes false representations and receives various sums from the victim the receipts may be cumulated to constitute but one offense of grand theft. [Citations.] The test applied in these cases in determining if there were separate offenses or one offense is whether the evidence discloses one general intent or separate and distinct intents. The same rule has been followed in larceny . . . cases, and it has been held that where a number of takings, each less than $200 but aggregating more than that sum, are all motivated by one intention, one general impulse, and one plan, the offense is grand theft. ([Citation]; *People v. Howes*, 99 Cal.App.2d 808, 818-821 [larceny]; *People v. Yachimowicz*, 57 Cal.App.2d 375, 381 [larceny]; *People v. Dillon*, 1 Cal.App.2d 224, 228-229 [larceny]; cf. [citation]; *People v. Sing*, 42 Cal.App.385, 395-396 [larceny] [.])" (*People v. Bailey, supra,* 55 Cal.2d at pp. 518-519.)

"The *Bailey* doctrine was developed for the crime of theft to allow, where there is a general plan, the accumulation of receipts from takings, each less than $200, so that the thief may be prosecuted for grand theft as opposed to several petty thefts. [Citation.]" (*People v. Slocum* (1975) 52 Cal.App.3d 867, 889.) "As *Bailey* emphasizes, the question of '[w]hether a series of wrongful acts constitutes a single offense or multiple offenses'

requires a fact-specific inquiry that depends on an evaluation of the defendant's intent. (*Bailey, supra*, 55 Cal.2d at p. 519.) Such an inquiry is appropriately left to the fact finder in the first instance. [¶] As with other such factual questions, reviewing courts will affirm the fact finder's conclusion that the offenses are not 'separate and distinct,' and were 'committed pursuant to one intention, one general impulse, and one plan' so long as that conclusion is supported by substantial evidence. (*Bailey, supra*, 55 Cal.2d at p. 519; [citation].)" (*In re Arthur V.* (2008) 166 Cal.App.4th 61, 69.)

We have recited the pertinent facts of the August 3 and 6, 2007 takings. They were only three days apart and, on each date, appellant was a store employee, his victim was the store, and he took store merchandise. Appellant's modus operandi was the same. Appellant entered the store after it had closed. He later exited, taking items which filled a shopping cart, and appearing to be a late shopper. The items were placed in a SUV. Moreover, as shown in our Factual Summary, there was substantial evidence, which we will not repeat here, that appellant's takings on the above two dates occurred pursuant to an understanding between appellant and one or more other store employees, e.g., Ortiz, that appellant would enter the store after hours and steal. In sum, there was substantial evidence that appellant committed the August 3 and 6, 2007 takings from the store pursuant to one intention, one general impulse, and one plan; therefore, the takings constituted one offense of grand theft of personal property, permitting aggregation of the value of each of the two takings.[4]

The remaining issue is whether the aggregated value of the two takings exceeded $400. We note that "[o]ur power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. [Citation.]" (*People v. Hernandez* (1990)

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[4] We note that appellant, in his second contention pertaining to multiple punishment and Penal Code section 654, cites *Bailey* and effectively concedes he committed the August 3 and 6, 2007 takings as part of a general plan as a basis for his argument that Penal Code section 654 barred multiple punishment on counts 4 and 5.

219 Cal.App.3d 1177, 1181-1182.) For the reasons discussed below, we conclude there was substantial evidence that the aggravated value exceeded $400.

On August 6, 2007, Jackson saw appellant stealing a car battery. Appellant told Valle that appellant bought a car battery (an Optima "high end" battery) and a tool kit. The jury was free to accept or reject all or part of appellant's statements, and reasonably could have concluded that the battery appellant claimed to have purchased was in fact the battery he had stolen in the cart on August 6, 2007. Appellant, referring to the battery and tool box, concedes in his opening brief that "[i]t is a fair inference that the battery, at least, may have been taken during the August 6, 2007 burglary." There was substantial evidence the battery was valued at $199, although there was also evidence it had a lesser value ($179). In short, there was substantial evidence that one of the items which was in the cart and which appellant stole on August 6, 2007, was a battery valued at $199.

We note appellant conceded he took the tool kit when he took the battery, the jury was free to reject appellant's claim that he did not steal the tool kit, and the jury was free to conclude that when, on August 6, 2007, appellant stole the battery, he also stole the tool kit. (As noted, tool kits were listed in People's exhibit No. 1.) We conclude there was substantial evidence that one of the items which was in the cart and which appellant stole on August 6, 2007, was a tool kit valued at $80.

There was substantial evidence that there were 20 items in the cart on August 6, 2007, including the above car battery and tool kit. This leaves 18 remaining unidentified items. The parties concede that reference may be made to People's exhibit No. 1 to identify items which could have been in the cart on August 6, 2007.[5]

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[5] For example, appellant states in his reply brief, "All the prosecution proved was that the cart was 'full.' . . . The list in People's Exhibit No. 1, page 7, indicates that there were large numbers of items taken that had small value, as well as some big ticket items. This cart could have been full of quarts of oil, containers of antifreeze, carpets, light bulbs, and/or wiper blades." Appellant later in his reply brief engaged in calculations based on the list, and argues, "[t]here are enough possible permutations of the items on the list that yield a total of 20 items [i.e., the number of items Jackson said were removed from the store on August 6, 2007], with a value of less than $400.00, to compel a

Even assuming the remaining 18 items in the cart on August 6, 2007, were the least expensive items on People's exhibit No. 1, i.e., quarts of oil at $3.50 a quart, there would have been 18 quarts of oil in the cart, each quart valued at $3.50, and, therefore, oil valued at $63 in the cart on August 6, 2007.

Moreover, since Jackson testified the cart on August 6, 2007 contained 20 items, the jury reasonably could have concluded that the cart on August 3, 2007, was capable of containing 20 items as well. The jury also reasonably could have concluded that the cart used on August 3, 2007, was capable of containing 20 quarts of oil. Even assuming, therefore, that the cart on August 3, 2007, contained 20 of the least expensive items on People's exhibit No. 1, i.e., quarts of oil, there would have been 20 quarts of oil in the cart, each quart valued at $3.50, and, therefore, oil valued at $70 in the cart on August 3, 2007. In sum, there was substantial evidence that the aggregated value of the items in the carts on August 3 and 6, 2007, was at least $412, representing $342, the sum of the values of the items in the cart on August 6, 2007 (the battery at $199, the tool kit at $80, and the oil at $63) plus $70, the value of the oil in the cart on August 3, 2007.[6] We hold there was sufficient evidence that appellant committed grand theft of personal property with a value exceeding $400, in violation of Penal Code section 487, subdivision (a). (Cf. *People v. Bailey*, *supra*, 55 Cal.2d at pp. 518-519; *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)[7]

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conclusion that the prosecution failed to prove that appellant stole $400.00 worth of merchandise on August 6th."

[6] We note the information alleged in count 4 that appellant committed a violation of Penal Code section 487, subdivision (a), "[o]n or between August 2, 2007 and August 6, 2007," and the jury, by their verdict, convicted appellant of violating that subdivision "*as charged* in Count 4 of the Information." (Italics added.)

[7] Appellant, in his opening brief, references Penal Code section 487, subdivision (b)(3). However, that offense is different from the offense of which appellant was convicted in count 4, i.e., a violation of Penal Code section 487, subdivision (a). (See *People v. Tabb* (2009) 170 Cal.App.4th 1142, 1145.)

Appellant argues "the items taken in the August 3rd burglary should not be aggregated with the items taken in the August 6th burglary to make a total value of $400.00, since appellant was acquitted of the August 3rd burglary [count 6]." We reject the argument.

We have not aggregated items taken during two burglaries. We have aggregated items taken during what, absent aggregation, would have been two thefts. There was substantial evidence, based on the facts concerning the two takings alone, that the takings were pursuant to a general plan. This is true whether or not (1) the taking on August 3, 2007, was pursuant to a general plan which predated August 3, 2007, or (2) appellant committed burglary on August 3, 2007, before the taking of that date. If count 6 had not been alleged, the facts concerning the two takings would have been sufficient to establish they occurred pursuant to a general plan. That fact is not altered by the fact that count 6 was alleged and appellant was acquitted on that count.

Moreover, even assuming the acquittal on count 6 was not merely an act of leniency by the jury, the acquittal merely meant the jury was not persuaded beyond a reasonable doubt that appellant intended to steal when he entered the store on August 3, 2007. That did not preclude the jury from concluding he intended to steal, pursuant to a general plan, after he entered. Further, we note that, although there was evidence that appellant was involved with thefts on 30 occasions, no evidence was presented concerning the date(s) on which those thefts occurred, who particularly was involved in them, or their circumstances.

Accordingly, even if the jury's acquittal on count 6 represented their rejection of the evidence of a plan prior to August 3, 2007, there was nonetheless substantial evidence of such a plan on August 3 and 6, 2007. We also note the jury, convicting appellant on count 5, necessarily concluded that at least on or about August 6, 2007, he *did* enter with a plan to steal.[8]

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[8] In a footnote in his reply brief, appellant makes two statements. He first states, "The $80.00 figure that is mentioned in the opening brief refers to the difference between the reduced purchase price that appellant paid and the retail value of the battery."

2. *Penal Code Section 654 Barred Punishment on Counts 4 and 5.*

At the April 15, 2008 sentencing hearing, the court stated, "as to both counts 4 and 5 of the information, you are ordered committed to the Department of Corrections for a period of two years, two years is the mid term. Those sentences will run concurrent[.]" The abstract of judgment reflects the court sentenced appellant to prison for the two-year middle term for grand theft (count 4), with a concurrent two-year middle term for second degree burglary (count 5).

Respondent concedes appellant's claim that Penal Code section 654 barred multiple punishment on counts 4 and 5. We accept the concession. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.)

Appellant then cites to page 3 of his opening brief. Appellant's second statement is, "If the battery that was on the cart on August 6th was the battery that appellant partially purchased, then he could only be considered to have stolen approximately $80.00 from the store when he removed the item."

As to appellant's first statement, we note that the only express reference to $80 in appellant's opening brief is found, as appellant suggests, at page 3 of his opening brief. However, the express reference at that page to $80 is not a reference to a battery, or a reference to the difference between "the reduced purchase price that appellant paid and the retail value of the battery," but a reference to the value of a tool kit. At page 3 of his opening brief, appellant said, "There was evidence to indicate that appellant removed a battery, worth about $199.00 *and a tool kit worth about $80.00*." (Italics added.) He then cites to various pages of the reporter's transcript. *Those* pages, fairly read, refer to two $80 amounts, i.e., (1) $80 as the approximate difference between the value of a battery ($179) and what appellant paid for it ($100), and (2) $80 as the value of the tool kit. In any event, as the quote from page 3 of appellant's opening suggests and as we have concluded, there was substantial evidence that the value of the battery appellant stole was $199. As to appellant's second statement, we note it assumes, we believe correctly, that the battery appellant claimed to have purchased was in fact the battery in the cart on August 6, 2007. We reject appellant's suggestion that he paid $100 for a battery valued at $179; therefore, he was entitled to an offset of $100 against the value of the battery with the result that he only stole an $80 battery. As mentioned, there was substantial evidence appellant took a battery worth $199 on August 6, 2007, without paying anything for it. Moreover, there is no claim of instructional error in this case, and CALJIC No. 14.26 (see fn. 3, *ante*) correctly instructed the jury on how to calculate value, without reference to an offset. (See *People v. Ross* (1972) 25 Cal.App.3d 190, 195.)

DISPOSITION

The judgment is modified by staying execution of sentence on appellant's conviction for the second degree commercial burglary (count 5) pending completion of his sentence on his conviction for grand theft of personal property (count 4), such stay then to become permanent, and, as modified, the judgment is affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment reflecting the above modification.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.